NO. 15966

In The United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, *Respondents;*

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *Intervenor.*

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief for The Building and Construction Trades Department (AFL-CIO), Intervenor

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In The United States Court of Appeals For The Ninth Circuit

NO. 15966

National Labor Relations Board, *Petitioner*

v.

Mountain Pacific Chapter of the Associated General Contractors of America; the Associated General Contractors of America, Seattle Chapter, Inc.; Associated General Contractors of America, Tacoma Chapter; International Hodcarriers, Building and Common Laborers Union of America, Local 242, AFL-CIO; and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, *Respondents;*

Building and Construction Trades Department, AFL-CIO, *Intervenor.*

On Petition for Enforcement of An Order of The National Labor Relations Board

BRIEF FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT (AFL-CIO), Intervenor

Order Allowing Intervention

The Building and Construction Trades Department (AFL-CIO) is a labor organization chartered by the American Federation of Labor in 1908. The Department is composed of eighteen (18) national and international building and construction trades unions, including the International Hodcarriers, Building and Common Laborers' Union of America, having a membership of more than three million

employees in the building and construction industry. Upon a motion of the Department for leave to intervene, filed under Rule 34, which had been consented to by all parties in this case, this Court issued its order on December 10, 1958, allowing the intervention.

Statement of the Case

In accordance with the provisions of paragraph 3 of Rule 18 of the Court, Intervenor wishes to note that Petitioner's "Statement of the Case" in its brief omits any statement of the Trial Examiner stage of this proceeding. In particular, Petitioner's Brief fails to state the conclusions of the Trial Examiner that the contract provisions in issue in this case are not illegal on their face. The pertinent sentence in the Trial Examiner's Intermediate Report and Recommended Order reads as follows:

> "Hence, I do not agree that the provisions of Section 6 of the Agreement between the A.G.C. Chapters and the District Council are invalid per se, and I find that by the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." (R.30)

The Trial Examiner stated his basic reason for the above conclusion as follows:

> "Bearing in mind such factors of industrial and economic convenience and necessity, I can see no basis for a presumption that a 'bare provision' delegating to a union the responsibility for the recruitment of labor in the terms expressed in Section 6 [of the Agreement] 'is intended to, and in fact will, be used' to encourage union membership. One could with at least equal logic, I think, presume that the purpose of such a provision, standing above, [alone], is to meet the industrial and economic convenience and necessities of employers and those seeking employment. Upon close scrutiny of the General Counsel's position, what it implies is that one should indulge a presumption from the naked provisions of Section 6, alone, that the parties thereto intend to, and will, use them for unlawful purposes, despite

> the fact that they may also be used for the lawful purpose of furnishing employers with an advantageous source for the supply of labor, and jobseekers with a convenient method of securing work. The adoption of such a doctrine would, in my judgment, run counter to traditional and elementary legal concepts." (R. 28-29).

The Intervenor also wishes to controvert Petitioner's statement of the rule established by the Board in this case. Petitioner's brief (pp. 12-13) states that:

> The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful. Where it can be shown that employees may reasonably expect that referrals to jobs will be made without regard to whether they are union members or comply with union policies, there is no premise for an inference of unlawful encouragement of union membership. Accordingly, it is entirely possible for parties to hiring agreements to take appropriate steps, which are indicated in the Board's decision, in order to neutralize the improper effects the enforcement of their agreement otherwise might have on job applicants, and thereby avoid illegality altogether."

The Board did not state its position in its decision as described above. Rather, the Board laid down a hard and fast rule which must be complied with by all parties to union hiring hall arrangements, to satisfy the Board's concept of legality, and the rule includes specific provisions which must be written into collective bargaining agreements. The pertinent language of the Board in its decision reads as follows:

> "We believe, however, that the inherent and unlawful enforcement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face, *only* if the agreement *explicitly* provided that:
>
> "(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or

any other aspects or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union.

"(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." (Italics supplied). (R.202-203).

The concluding paragraph of section 2 of the Board's decision makes it clear that it found that the execution and maintenance of hiring provisions of the contract violates Section 8 (a) and (3) and (1) and Section 8 (b) (2) and 1 (A) of the Act because the contract did not contain any of the above safeguards. (R. 205).

If there were any doubt as to the matter, it is entirely resolved by the subsequent decisions of the Board.

In *K. M. & M. Construction Co.*, 120 NLRB No. 140, 42 LRRM 1104 (*May 22, 1958*), a hiring arrangement which reserved to the Employer the right to reject applicants was held to be in violation of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act because it did not contain the two other criteria announced by the Board in its *Mountain Pacific* decision (*March 27, 1958*). The Trial Examiner, in the *K. M. and M. Construction Co.* case had found the agreement in violation of the Act but the Board preferred to base its decision on the *Mountain Pacific* rule:

> "While we agree with his conclusion, we do not herein adopt his reasoning but rely upon our recent decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.* etc., 119 NLRB No. 126, 41 LRRM 1460, and the rationale therein. That case laid down three criteria which, if met *fully* and *in toto* would save such an exclusive arrangement from the interdiction of the Act. Though the clause in question in the instant case met one of the three criteria—the reservation to the employer of the right of rejection of any person re-

> ferred by the Union—it failed to meet the other two criteria. It therefore did not meet all of the criteria required and is *ipso facto* invalid and in violation of the Act. We so find."

In the case of *E. & B. Brewing Co.,* 122 NLRB No. 50, 43 LRRM 1128, (December 9, 1958), the Board has unmistakably interpreted its decision in the *Mountain Pacific* case as having the effect of a rule or regulation. In this case the parties had agreed to two of the criteria later set forth in *Mountain Pacific* but had omitted to included a posting provision (their agreement having been made prior to the announcement of the rule). The Board held the agreement unlawful:

> "After the issuance of the Intermediate Report, however, the Board issued its opinion in Mountain Pacific Chapter of the Associated General Contractors, Inc. et al., 119 NLRB No. 126-A, 41 LRRM 1460, reversing a similar conclusion of another Trial examiner and holding that an exclusive hiring-hall contract was unlawful unless it explicitly provided for three safeguards, including a requirement that the contracting parties duly post all provisions relating to the functioning of the hiring arrangement. The contract in this case contained no such safeguard, at [as] the Union concedes. But the Union argues that the basic rules of due process preclude the so-called retroactive application of such a requirement. We find no merit in this argument.[1]
>
> [1] See the *Mountain Pacific* case, supra."

The footnote makes it clear that the foregoing ruling is the ruling of the *Mountain Pacific* case, even to the extent that there the Board was in fact applying its rule retroactively.

In the controverting of Petitioner's Statement of the Case, Intervenor deems it necessary to bring to the attention of this Court the decision of the Board in the case of *Brown-Olds Plumbing and Heating Corporation,* 115 NLRB 594. Under the doctrine of this case, which is being applied, hiring arrangements deemed illegal by the board subject employer and union alike to penalties, including the reimbursement to all employees subject to such hiring arrange-

ments of all dues, fees and other charges paid to the union by such employees (including members of the union) for the period commencing with the day six months prior to the filing of the unfair labor practice charge.

The current effect of the *Mountain Pacific* and *Brown-Olds* decisions on employers and employees in the building and construction industry may be ascertained from the large scale revision of agreements and practices which has been undertaken. 1 Labor Rel. Rep. 9-10 (1958); Id. 261. See Affidavit of Richard J. Gray submitted in support of Motion to Intervene in the instant case.

It is respectfully submitted that the definition of the questions in this case depends in part upon the proper characterization of the Board's decision. It is the view of the Intervenor that since substance, rather than form, governs (*NLRB* v. *Guy F. Atkinson Co.,* 195 F. 2d, 141) the Board's *Mountain Pacific* rule accompanied by its present legal effect on many parties in this and other industries is a rule or regulation having the force of substantive law.

As the Supreme Court has said in *Columbia Broadcasting Co.* v. *United States,* 316 U.S. 407 (1942):

> ". . . a valid exercise of the rule-making power . . . sets a standard of conduct for all to whom its terms apply . . . It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails . . .
>
> "Such regulations have the force of law . . ." (at p. 418)

In that case, the issue was judicial reviewability of the announcement of a rule of the Federal Communications Commission stating the types of provisions in agreements between networks and their affiliates which would be grounds for refusal to renew licenses in future licensing proceedings. The Commission characterized its statement as "no more reviewable than a press release" (at p. 422). The Court disagreed because the present effect of the announced policy was to cause cancellations and threats of

cancellation of agreements between C.B.S. and other stations. The Supreme Court stated:

> "The regulations are not any the less reviewable because their promulgation did not operate of its own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees and appellant with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty." (at p. 418)

And elsewhere:

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional cases by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."
> (at p. 425)

In the *C.B.S.* case the issue was judicial reviewability, here the question is whether the *Mountain Pacific* rule should be deemed a substantive rule or regulation which is to be judged as such. It is submitted that the same considerations which were deemed to establish the status of the rule in the *C.B.S.* case as reviewable are sufficient to establish the status of the *Mountain Pacific* rule as that of a rule or regulation having the effect of substantive law.

The language of the Supreme Court is applicable here:

> "The particular label placed on it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." (at p. 416)[1]

---

[1] The Court in the instant case is faced with an instance of the exercise of the machinery of adjudication for rule-making purposes. Herein we have the other side of the coin from that presented in *Philadelphia Co. v. S.E.C.*, 164 F 2d 889 (C.A.3, cert. denied 333 U.S. 828). There, as the Court observed in *NLRB v. Guy F.*

SUMMARY OF ARGUMENT

The Board did not act in accordance with law in finding that the exclusive hiring agreement in this case is unlawful under Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act.

It is apparent that the hiring provisions of this particular agreement were not unlawful on their face. Nevertheless, the Board found that the hiring hall provisions of the written contract were unlawful apart from all other evidence in the case.

There is no provision in the Act prohibiting union hiring halls as such. The legislative history of the Act shows that Congress did not intend that the Act should be construed to abolish the institution of union hiring halls as distinguished from closed shop practices or other illegal preferences in employment based upon union membership. Nor was the Board given administrative power or discretion to do so.

Where there is an otherwise lawful union hiring hall contract, the Board's power is limited to finding whether the evidence shows that the administration of the hiring hall in the particular case is unlawful. The Board cannot create for itself a power to abolish all union hiring halls in each enterprise of every industry in the United States where labor and management agree to the establishment of such hall *unless* the parties conform to the specific conditions promulgated by the Board, including the writing of specific clauses into the collective bargaining agreement and their taking the affirmative action of posting the "safe-guards" deemed "essential" by the Board.

Atkinson, 195 F. 2d 141 (C.A.9, 1952), action of the Commission labelled as a rule and promulgated by rule-making proceedings was held in view of its actual operation to be an adjudication or order. The key to the Court's decision lay in the fact that the rule though phrased in general, legislative-like terms concededly had application only to the petitioner and applied specifically to affect existing rights of the particular person.

The Board is an administrative agency which does not possess the power to enact legislation. Nor can the Board accomplish such legislative object by indirect means.

The Board is not empowered to adjudicate an entire class of cases in the adjudication of a particular case. *Office Employees Int'l Union* v. NLRB, 353 U.S. 313; *Hotel Workers* v. *Leedom,* 358 U.S. 99, 27 LW 4022. The Board has sought to do so by ruling in the instant case that all union hiring hall contracts in any enterprise of every industry in the United States, where labor and management choose to provide for such halls in their collective bargaining agreements, are unlawful *unless* they conform to the explicit conditions promulgated by the Board.

The Board has made an *ad hoc* adjudication in the instant case in form only. In substance it has issued a rule or regulation having the force and effect of law. The rule of the *Mountain Pacific* case commands all affected parties in the building and construction industry to take affirmative action in compliance with the substantive requirements of the rule. Parties failing to comply with this command are subject to penalties, including the *Brown-Olds* remedy which requires the employer and the union to reimburse all employees covered by the prohibited union hiring hall contract for all dues, fees and other charges paid to the union for the period dating back six months prior to the filing of the unfair labor practice charge.

The promulgation of this particular rule is beyond the power of the Board (whatever its administrative power may be to issue substantive rules and regulations under Section 6) because it is in conflict with the intent of Congress. In any event, the Board has not followed the procedural requirements for notice and an opportunity to express views on proposed rules as prescribed by the Administrative Procedure Act. And the retroactive application of the *Mountain Pacific* rule to the parties in this and other cases is arbitrary and capricious.

The Board has assumed "a roving commission to inquire into evils and upon discovery correct them" which is not warranted under our legal system. *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495, 551.

ARGUMENT

I. Congress Did Not Intend to Abolish the Union Hiring Hall as an Economic Institution in the Building and Construction Industry, the Maritime Industry or Other Industries. Congress Intended to Make Unlawful in all Hiring Systems Preference in Employment Based Solely on Union Membership.

It is apparent that the Act contains no language which expressly abolishes the union hiring hall or which establishes the conditions under which such halls shall be established or which delegates power to the National Labor Relations Board either to abolish such halls or to formulate the conditions under which such halls shall be established subject to appropriate legislative standards.

The general language of Section 8 (a) (3) and (1) and Section 8 (b) (1) (A) and (2) are relied upon by the Board to support its assumption of power in this case.

The Board has sought, in this case, to abolish all union hiring halls as such, *unless* the halls are established under the conditions promulgated by the Board and it has, in effect, issued rules and regulations prescribing the *only* basis upon which such halls may be lawfully established.

In doing so, the Board has ignored the legislative history of the Act which shows that Congress intended to make unlawful preference in employment based on union membership in all hiring systems, without affecting the legal validity of the union hiring hall as such.

As Senator Taft has said:

> "In order to make clear the real intention of Congress, it should be clearly stated that *the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment*

agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .

* * * * * * * * *

"The majority report proceeds upon the erroneous assumption that . . . maritime unions cannot continue to have hiring halls . . . *The National Labor Relations Board and the courts did not find hiring halls as such illegal but merely certain practices under them. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, so long as they are not so operated as to create a closed shop . . .*" S. Rept. 1827, 81st Cong. 2d Sess. pp. 13, 14. (Emphasis added).

The above statement was made after the enactment of the Taft-Hartley Act. A statement to similar effect was made, however, by Senator Taft during the course of debate on this Act:

"As a matter of fact, most of the so-called closed shops in the United States are union shops; there are not very many closed shops. *If* in a few rare cases *the employer wants to use the union as an employment agency, he may do so.* But he cannot make a contract in advance that he will only take the men recommended by the union." (2 *Leg. Hist.,* LMRA 1010) (Emphasis added).

It is true, of course, that an administrative agency such as the Board can change its interpretation of the Act which it administers but it is worthy of note that the Board adhered to the above interpretation of the Act for many years preceding its decision in *Mountain Pacific.* See *Hunkin-Conkey Construction Co.,* 95 NLRB 433 and cases there cited.

It should also be noted that when Congress intended to accomplish a flat prohibition of a practice it knew how to select words which would effectively convey that meaning. See Section 8 (b) (4) (A) which makes it an unfair labor practice to engage in certain labor activity "where an ob-

ject thereof is: (A) forcing or requiring any . . . person to cease doing business with any other person . . ." Senator Taft, in that connection, made it clear that there was no intention to distinguish between "good" and "bad" secondary boycotts; the language prohibited all secondary boycotts. (2 Legis. Hist. 1106).

Congress also was able to find explicit words showing its intention to have substantive rules and regulations promulgated by the Board where it wished to do so. Thus, section 8 (a) (2) provides that it shall be an unfair labor practice for an employer

> "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided,* That *subject to rules and regulations made and published by the Board pursuant to section 6,* an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." (Italics supplied).

It is, of course, understandable that Congress would not have wished to destroy the union hiring hall in the building and construction industry, the maritime industry and other industries. The union hiring hall is a part of the system of production in these industries.

Economic facts caused the establishment of the union hiring hall in the building and construction industry long before the enactment of the Taft-Hartley Act.

On October 26, 1949, the construction employer representative serving on the Joint Board for the Settlement of Jurisdictional Disputes made a statement to the National Labor Relations Board which set forth the applicable economic facts of the industry. These employer representatives described construction employment procedure in the construction industry as follows:

1. Each employer constructs on numerous separate projects in each year.

2. Until a project is started he has no manual "employees."
3. On each project there are usually several "employers" frequently using different crafts of workmen.
4. On each project there is a constant shifting of crews on and off the job as the work progresses.
5. In each crew there are frequent changes in the men when the crew returns to the job.
6. There is not a time on the job when all men and all crews eventually employed will be so employed at the same time.
7. The workmen are drawn from an "area pool" of available workmen who will work for many or all employers in the area, or may drift from one area pool to another area pool.
8. When a workman's function on a job is temporarily or permanently finished they [*sic*] are laid off and returned to the pool for use on other jobs or by other construction employers.
9. A vast number of projects in the industry are of but a few days' or hours' duration for a given craft.
10. This quick need and rapid shifting of men in and out of the pool to various projects requires a previously established and uniform understanding of employment terms for all jobs and for all contractors in order to avoid delays in hiring and misunderstandings as to the terms of employment.
11. Each employer's policy as to wages and working conditions must be comparable to that of other employers of the men in the pool.[2]

The employer representatives described the customary hiring practices in the construction industry as follows:

> It has been the traditional custom in the Construction Industry, whether or not the workmen were union

[2] Hearings on S. 1973 Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess. 155 (1951).

members, for the employer to have the right to select the workmen best suited for the work to be done.

It was his traditional custom in selecting men to consider necessary qualifications, such as—

A. Basic training for the work: For quality of work and good production he must be assured that he has had sound basic training.

B. Experience: He should have had experience in performing that kind of function, on that kind of construction, and with similar contractors and other crews.

C. Skill: He should have a degree of skill such as has been required by other contractors for similar work.

D. Safety training: He should have worked where proper precautions against accidents are taken and safety practices have been recognized—otherwise he will endanger himself and the safety and morale of the entire working force.

E. Cooperation: He should be cooperative in his attitude to the other workmen on other trades on the job.

F. Permanent connections: It must be possible to locate him on such short notice for employment and after employment:

G. Character reference: In many operations reputation for good character is essential.

It is obvious that the quick need for workmen in construction makes the use of men not previously employed by this management frequent. *It is likewise obvious that some agency would be used which could identify men of the qualifications required except in the few cases where the operations were so limited as to require only a small standard crew constantly performing similar work.* (Emphasis added.)

It has been the custom in many communities where union men are employed to measure these qualifications to large degree by the workman's ability to hold a membership in a union. *Under many circumstances the union did function as the only recruiting agency which*

could obtain quickly the qualified men required by the employer. (Emphasis added.)

The use of employment agencies—At one time in some areas the employers of non-union construction workers found it necessary to recruit through an employment agency to find the qualified workers needed.

The service of furnishing contractors qualified and trained workmen—The function of training and recruiting qualified men for an area pool, and identifying the qualifications for certain work, is a most important service to the employer.

The selection of workmen because of their qualifications should not be construed as unfair discrimation —The men are generally selected for their qualifications, not for the kind of card they carry, or the absence of one. If, however, the selection of a workman solely because he can furnish evidence of training, experience, skill, safety training, cooperation, permanent connections, and character references—in a given community by virtue of being a member of a given union which can vouch for these qualifications—in place of some workmen without substantiated evidence of such qualifications for the work to be performed, then the employer's choice must not be regarded as discrimination in favor of union membership and he must not be deprived of the right to use his own criteria in judging the qualifications. To do otherwise will destroy the production, quality, and efficiency of construction operations.

The construction employer should not be deprived of his right to select his source of labor supply, just as he selects his source of the various materials without charges of discrimination unless it is shown that the intent was to discriminate for or against membership in a certain union.[3]

A representative of a large construction company has testified before a Senate committee to the value of the union as a recruiting agency from the employer's point of view in the following language:

---

[3] Id. at 158-59.

> As you will note by a study of our agreements, basically they all provide that the contractor has freedom of selection, so that when the men are sent to him he has control of how long they stay on the job. He can pick the men he wants.
>
> But the manner of bringing the men in, certifying as to their qualifications, and bringing them to the job generally is best handled by the representatives of the workmen themselves.[4]

The economic facts and the experience with respect to hiring halls in the maritime industry are set forth in J. P. Goldberg's "The Maritime Story," Harvard University Press, 1957, pp. 277-282.

The legislative history of the Act tends to show that Congress intended that the Board should administer the applicable provisions of the Act on a case-by-case basis with respect to hiring practices in union hall cases and to patently illegal preferential provisions in the documents establishing the hiring hall.

In the instant case, however, the Board has promulgated rules and regulations directing labor and management how to formulate the documents establishing the hiring hall and assessing penalties for failure to comply with such directions apart from any evidence of unlawful discrimination. The status of Respondent Council clearly demonstrates that this is the legal issue in the case. Council executed the agreement (which is not cognizable by the Board because of the six months' statute of limitation period) and maintained it (in the sense of not rescinding the agreement) but Council *did not administer* the union hiring hall. Dispatching of men was handled by Local Union 242, a separate entity. (R. 14) The *nexus* of Council to this case can, therefore, be found solely in the contractual provisions of the agreement.

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[4] Id. at 173-74.

Since the Board has made it clear that its decision is made on the basis of the contract apart from any other evidence in the case, it must be inferred that the agreement in itself was in violation of the Act in the Board's view, even though in fact there is no evidence to show illegal discrimination. Under these circumstances it appears that the Board's rules and regulations make unlawful this contract and any other, even though the parties intend to operate the union hiring hall in a proper manner and in fact do so. The Board assumes the power to require that the collective bargaining of the parties must result in a document containing the words prescribed by the Board.

It is respectfully submitted that whether the actions of the Board in this regard be viewed as an adjudicatory matter or as an evidence of rule making power, the Board has exceeded its authority.

II. The Rules and Regulations Governing the Establishment of Union Hiring Halls Which Were Promulgated by the Board in the Mountain Pacific case Are Not in Accordance with Law, Are in Excess of the Statutory Authority of the Board and Were Made Without Observance of Procedure Required By Law.

A. Authority of the Board to Issue Substantive Rules and Regulations

Sec. 6 of the Act confers upon the Board authority to make, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of the Act. Sec. 8 (a) (2) also refers to rules and regulations relating to employer-employee conferences during working hours. It is, however, doubtful that the Congress, at least since the Taft-Hartley re-enactment of Sec. 6 in 1947, intended to confer upon the Board the power under Sec. 6 to issue substantive rules, with the exception of the rules and regulations specifically

referred to in section 8 (a) (2). The legislative history underlying the change in Sec. 10 (c) from "all the testimony" to "the preponderance of the testimony" and in 10 (e) from "evidence" to "substantial evidence on the record considered as a whole" plainly indicated the Congressional intent to forestall recurrence of such decisions as those in *Republic Aviation* v. *NLRB,* 324 U.S. 793 and *Letourneau Company* v. *NLRB,* 324 U.S. 793.

Thus S. Rept. No. 105, on S. 1126, 80th Cong. 1st Sess., referring to the change in Sec. 10 (e) explains the reason therefor:

> "Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the courts not to disturb Board findings even though they may be based on questions of mixed law and fact (*NLRB* v. *Hearst Publications,* 322 U.S. 111, 102 F2d 638) or inferences based on facts which are not in the record (*Republic Aviation v. NLRB,* 324 US 793 and *Letourneau Company v. NLRB* 324 US 793) . . . it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails."

And H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. at pp 55-56 states:

> "In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and fact (*NLRB v. Hearst Publications, Inc.,* 322 U.S. 111; *NLRB v. Packard Motor Car Co.,* decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation v. NLRB,* 324 US 793; *Le Tourneau Company v. NLRB,* 324 US 793).
>
> ". . . presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions . . .

> "(T)he courts . . . will be under a duty to see that the Board observes the provisions of the earlier sections [10 (b) and 10 (c)] and that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in . . . [the] *Republic Aviation* and *Le Tourneau,* etc. cases . . . without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act."

In *Republic Aviation* and *Le Tourneau* the court approved the Board's establishment of a rebuttable presumption to the effect that an employer's banning of solicitation in a plant during non-work time is illegal in the absence of evidence that special circumstances necessitated the employer's no-solicitation rule. The legislative history thus reveals an intent to preclude the Board from creating rebuttable presumptions of illegality. It would follow *a fortiori* that the intent of Congress, at least since the amendatory act of 1947, was to preclude the issuance of substantive rules which are tantamount to conclusive presumptions of illegality.

That the Board has not at any time in its 23-year history attempted to exercise formally such a substantive rule-working power is not conclusive but is persuasive against the existence of any such power. An examination of the Board's Rules and Regulations issued under Section 6 of the Act shows that such rules and regulations are limited to matters of practice and procedure before the Board. Even the powers contemplated by section 8 (a) (2) of the Act have not been exercised.

B. The Rules and Regulations Governing the Establishment of Union Hiring Halls Promulgated by the Board Are Not in Accordance With Law And Are in Excess of The Statutory Authority of The Board

The Board is empowered by section 10 (a) "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." It should be noted parenthetically that this statutory power is applicable solely to alleged violations defined in the Act and not to rules and regulations prescribed by the Board. The steps in the adjudicatory proceeding are carefully set forth and it is further provided in section 10 (c) that:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any *such unfair labor practice* [i.e. listed in section 8], then the Board shall state its *findings of fact* and shall issue and cause to be served on *such person* an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (italics supplied).

Section 10 (e) provides that "the findings of the Board with respect to questions of fact if supported by *substantial evidence on the record as a whole* shall be *conclusive.*" (Italics supplied). It is apparent that Congress established statutory standards of lawful conduct in section 8 and vested administrative power in the Board to apply such standards to the particular case based upon the preponderance of the testimony taken in the particular adjudicatory proceeding.

What the Board has done here is to lay down an inflexible rule or regulation governing the disposition of this and all future cases and having present legal effect on all parties subject to its command by reason of the applicability of the *Brown-Olds* remedy. The said rule or regulation of the

Board has the effect of transferring the burden of proof from the General Counsel to the respondent and, indeed, of preventing the respondent from disproving the alleged violation of the statutory standard prescribed in section 8, if the language of the particular union hiring hall agreement, although otherwise lawful on its face, does not accord with the specific requirements of the *Mountain Pacific* rule. Even if it is assumed, for the purposes of this case, that the Board has power to issue substantive rules and regulations it is respectfully submitted that it is plain that this particular regulation is not in accordance with law and exceeds the statutory authority of the Board.

Other Federal administrative agencies have fallen into similar error and have been corrected by the Federal judiciary.

In *Miller v. U. S.*, 294 U.S. 435 (1935) the Administrator of Veterans Affairs issued a regulation to the effect that loss of the use of one hand and one eye constituted "total permanent disability" under a war risk insurance statute providing for payments for "total permanent disability". The statute empowered the Administrator "to make such rules and regulations, not inconsistent with the statute, as may be necessary or appropriate to carry out its purposes." The Supreme Court ruled that

> "It [the regulation] is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the Act. It is not in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force . . . is that in respect of compensation allowances [a different program under a Title of the statute different from the war risk insurance program], loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character . . . constitutes total permanent disability is left to be determined as a matter of fact.

> *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred by the statute, is to make regulations to carry out the purposes of the Act—not to amend it." (at p. 439) (italics supplied)

Another case holding to similar effect as the *Miller* case is *Work v. Mosier,* 261 U. S. 352 (1923). In the *Mosier* case the statute permitted the Commissioner of Indian Affairs, subject to the supervision of the Secretary of Interior, to withhold the payment to parents of minors of income from land owned by Indian tribes, if he is satisfied that the said interest of any minor is being "misused or squandered". The Secretary of Interior issued an order under this statute providing that no more than $50 per month would be paid to parents in the future, unless a specific showing was made that the funds were being used for the specific benefit of the children. The Supreme Court held that the order exceeded the power vested in the Secretary in that it seeks to lay down a general rule for the future, whereas under the statute he is to decide each case as it comes up. The Court stated:

> "The record shows that the Secretary enlarged this discretion vested in him . . . into a power to lay down regulations, limiting in advance the amount to be paid to the parents. . . . However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary.
>
> ". . . The proviso (re misuse) did not confer on him a power to determine in advance by general limitation a monthly rate . . . nor did it enable him to require before payment a showing. . . ." (at pages 359-360.)

The basic effort of the Board in the *Mountain Pacific* case to substitute the promulgation of rules and regulations governing the formation and establishment of union hiring

halls for the case-by-case determination of fact required by the statute is subject to the same defect of lack of legislative authority which was found by the Supreme Court in the *Miller* and *Mosier* cases, *supra.* The Board is not authorized to substitute its policy for the Congressional policy.

In *Colgate-Palmolive-Peet Company v. NLRB,* 338 U. S. 355 the Supreme Court reviewed the so-called Rutland Court Doctrine of the National Labor Relations Board. Under that Doctrine the Board held that even under a valid closed shop contract the union could not seek to secure the discharge of employees engaged in dual union activity at a time when it was permissible to contest the status of the bargaining representative in a represenation proceeding under the Act. The Court took the view that a valid closed shop contract must be given full effect in accordance with its terms and rejected the Rutland Court Doctrine. The basic position of the Court on the matter of the relationship between Administrative and Congressional policy was stated as follows:

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." (at page 363).

In addition to the above mentioned deficiencies, the rules and regulations promulgated by the Board in the *Mountain Pacific* case are in conflict and are inconsistent with specific sections of the statute.

The *Mountain Pacific* rule relieves the General Counsel of the burden of proof. Under section 10 of the Act, the

burden of proving a violation of the Act rests at all times upon the General Counsel. (*NLRB v. D. Gottlieb and Co.,* 208 F. 2d 682, C.A. 7 (1953); *NLRB v. Miami Coca Cola Bottling Co.,* 222 F. 2d 341, C.A. 5 (1955); *NLRB v. West Point Manufacturing Co.* 245 F. 2d 783, C.A. 5 (1957). This burden of proof never shifts. (*NLRB v. Winter Garden Citrus Products* 260 F. 2d 913, 35 L. C. ¶71, 940, 43 LRRM 2112, C.A. 5. (1958). Even the fact that an arrangement has an inherent capacity for discriminatory application and is administered by a party with strong bias in the matter does not shift the burden of proof. (*Interlake Iron Corp. v. NLRB,* 131 F. 2d, 129 (C.A. 7, 1942). This fundamental requirement with respect to the burden of proof would, as this Court ruled in *NLRB v. Swinerton,* 202 F. 2d 511 (C.A. 9, 1953), be disregarded by the rule promulgated by the Board.

The *Mountain Pacific* rule requires the parties to agree to the explicit language set forth in the rule. Section 8 (d) defines the duty to bargain collectively and specifically provides that the obligation to bargain collectively "does not compel either party to agree to a proposal". As stated in the early decision of the Board in *Consumers' Research, Inc.* 2 NLRB 57, "By the Act, the terms of agreement are left to the parties themselves; the Board may decide whether collective bargaining negotiations took place, but it may not decide what should or should not have been included in the union contract." (at page 74). This proposition should not be confused with the undoubted power of the Board to declare provisions in contracts which transgress the requirements of the statute to be illegal, as in the case of an agreement which provides for illegal preference in employment.

The *Mountain Pacific* rule gives the employer a unilateral right to determine whether he shall accept any particular applicant for employment; this subject is removed from collective bargaining. It has been held, however, that applicants for employment are covered by the Act as well as

employees. (*Phelps-Dodge Corp. v. NLRB* 313 U. S. 177.) It cannot be doubted that under section 8 (d) and section 8 (a) (5) of the Act the employer would be guilty of a refusal to bargain charge if he refused to discuss a clause requiring that his rejection of applicants be made for cause, or that he select applicants in accordance with an area plan of seniority.

The *Mountain Pacific* rule requires that the parties "post" "all provisions relating to the functioning of the hiring arrangement, including the safeguards that we [Board] deem essential to the legality of an exclusive hiring agreement". (S.R. 203). Failure to comply with this requirement makes the agreement illegal even though all other requirements have been satisfied. (See *E. and B. Brewing Company, supra*). Section 10 (c) of the Act provides, however, that an order requiring parties 'to take affirmative action" can be made only after the adjudicatory procedures of the Board have been completed.

In all of these regards, the rules and regulations promulgated by the Board in the *Mountain Pacific* case are in direct conflict with the statute, and therefore are not made in accordance with law and exceed the authority of the Board.

C. The Rules and Regulations Contained in the Mountain Pacific Case Were Made Without Observance of Procedure Required by Law.

Even if the Board had the power to issue the rules and regulations contained in the *Mountain Pacific* case, the decision should be set aside because the applicable procedures of law have not been observed. Section 6 of the Act, which contains an amendment enacted in 1947, requires that rules and regulations of the Board be made "in the manner prescribed by the Administrative Procedure Act". Section 4 (a) and (b) of this Act provides for public notice of proposed rulemaking which shall include "the terms or sub-

stance of the proposed rule or a description of the subjects and issues involved" and also an opportunity for all interested persons to participate in the rulemaking, through submission of their views. The appropriateness of such procedure, in the instant case, is apparent. The Board has, in this case, issued a general rule of widespread application to all American industry, even though it did not have before it the economic facts relating to the various industries affected by the rule. There are, also, substantial variations in fact within any particular industry. In the Building and Construction Industry, for example, there are approximately 18 different trades. The applicable facts in each of these trades may be expected to be different, yet the Board has established a uniform rule and regulation applicable to many different situations of which it could not possibly have any knowledge.

It is of interest to note that this Court raised the question as to the application of the Administrative Procedure Act to the matter of the Board's assuming jurisdiction in adjudicatory proceedings. (*NLRB v. Guy F. Atkinson Company et al,* 195 F. 2d, 141 (C.A. 9, 1952). The Court pointed out that substance rather than form must govern, but did not decide the question of the applicability of the Administrative Procedure Act because it was unnecessary to the decision of the actual case. The Board did not follow the procedures of the Administrative Procedure Act in its 1954 revision of Jurisdictional Standards. The procedures of the Administrative Procedure Act were followed, however, by the Board in its 1958 revision of such Jurisdictional Standards and are being followed in the currently proposed 1959 revisions. (NLRB Release R-570, 42 LRR 363; NLRB Release R-586, 43 LRR 233).

The prescription of specific standards for exclusive union referral agreements is no less than the assertion of jurisdiction, a subject of rulemaking under the appropriate procedures appertaining thereto.

III. The Board Is Not Empowered To Adjudicate Cases on a Class Basis In The Exercise to Its Quasi-Judicial Authority.

Intervenor has contended in previous sections of this brief that the *Mountain Pacific* doctrine is a rule or regulation having the force and effect of substantive law and should be reviewed judicially on that basis. This contention is founded on the basic assumption that substance rather than form determines the character of the administrative action. See *Guy F. Atkinson v. NLRB,* 195 F. 2d 141, (C.A. 9, 1952).

The Board has not, however, clearly defined the legal status of its doctrine. It prefers to promulgate such doctrine as an incident of its quasi-judicial powers. Yet the effect of the Board's decision is to establish a clear and sweeping rule or regulation applicable to wide areas of American industry. It is respectfully submitted that even if the vague and unnamed label applied by the Board to its doctrine is accepted, its attempted exercise of quasi-judicial powers on a class basis is illegal.

The Board has decided herein that the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring feature. (S.R. 197). Subsequent action by the Board has confirmed the interpretation that the *Mountain Pacific* decision was intended to apply to all industries and to all cases. *Houston Maritime Assn.,* 121 NLRB No. 57, 42 LRRM 1364; *Los Angeles-Seattle Motor Express,* 121 NLRB No. 205, 43 LRRM 1029; *E & B Brewing Co.,* 122 NLRB No. 50, 43 LRRM 1128 and *Schenley Distillers,* 122 NLRB No. 61, 43 LRRM 1155.

It is respectfully submitted that although the administrative process is flexible, it is not sufficiently expandable to allow this procedure.

The Board has sought in other non-rulemaking proceedings of adjudicatory nature to make similar class rulings.

These proceedings have related to the Board's power to decline to assert jurisdiction, which would appear to be an area allowing broader scope to the exercise of administrative discretion (since considerations of budgetary nature, personnel and similar items are involved) than in the interpretation of substantive provisions of law applicable to the parties, as in the instant case. Nevertheless, the Supreme Court has struck down the Board's attempt to make a class ruling in the jurisdictional cases. In *Office Employees International Union, Local No. 11 v. NLRB,* 353 US. 312, the Supreme Court held that it was beyond the power of the Board to decline to assert jurisdiction over unfair labor practice complaints against unions as a class, when acting as employers. The Court stated that

> "We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary and was beyond its power." (at p. 320).

It is respectfully submitted that for the reasons stated in this section of the brief and in the preceding sections, the same conclusion should be applied to the *Mountain Pacific* decision. It should be noted, in this connection, as has been previously discussed in detail, that the *Mountain Pacific* rule transgresses specific provisions of the Act relating to such matters as burden of proof, definition of collective bargaining and procedures required to be maintained *before* ordering parties to take affirmative action.

See also *Hotel Employees Local No. 225 v. Leedom,* 358 US 99, 36 L.C. ¶65,023 (Nov. 24, 1958) where the Supreme Court held that:

> "We believe that dismissal of the representation petition on the *sole ground* of the Board's long standing policy not to exercise jurisdiction over the hotel industry as a class, is contrary to the principles expressed in *Office Employees v. Labor Board,* 353 U.S. 313, 318-320." (Italics supplied).

The decision of the United States Court of Appeals for the Eighth Circuit in *NLRB v. Teamster Local 41,* 225 F. 2d

343 (Aug. 26, 1955) (*Pacific Inter Mountain Express Co.*) cannot be relied upon for the contra position. The factual distinction between delegation of authority as to seniority and the use of union hiring halls is discussed fully in the Trial Examiner's Intermediate Report (R. 25-30). The judicial decree of the Court of Appeals and the explanation thereof contradict the proposition that the contractual provisions in that case were actually treated by the Court as per se illegal.

The order of the Board directed the union (1) to cease and desist from preforming or giving effect to the provisions of the contract with the employer, or with any other member of a motor carrier group, which delegated authority to the union to settle controversies over seniority, and (2) from making or renewing such agreement with any other employer. The Court enforced only that part of paragraph (1) of the order in relation to the contract with *Pacific Inter Mountain Express Company,* the immediate employer, and refused enforcement of paragraph (2) of the Board's order.

In explaining its limitation of the order to the contract with the immediate employer, the Court said

> "We desire to make it clear and to emphasize, in consonance with what has precedingly been said, that we are allowing the union to be prohibited here from performing or giving effect in any way to the contract provision *in the particular situation, not because of its having made the contract provision, but because of the abuse to which it has seen fit to put the provision in the specific situation.* This abuse has been such that we think the Board could properly have left the union where it would not be able to make any further possible use of the provision *in the particular employment situation,* even if the provision itself had been generally valid."

Compare Petitioner's Brief p. 31 fn. 24.

The decision of the Board in the instant case is based solely on the hiring provisions apart from any other evi-

dence in the case. It is not based on evidence of alleged abuses in the particular situation. This is clearly brought out by comparing the decision of the Board here with a previous decision on the same contract in *Mountain Pacific, Seattle and Tacoma Chapters AGC, Jussell and Gaulke,* 117 NLRB 1319 (April 22, 1957). There, a majority of the panel of the Board based its decision on evidence of abuses rather than contract language. A single concurring member affirmed the Trial Examiner's Report on the assigned ground that the contract was per se violative of Sections 8 (a) (3) and (1) and 8 (b) (1) (A) and (2) of the Act. It is this concurring position which appears to be followed generally by the Board in the instant *Mountain Pacific* case.

It is respectfully submitted that the "grounds upon which an administrative order must be judged are those upon which the record discloses its action was based". *S.E.C. v. Chenery Corp.,* 318 U.S. 80 at p. 87. The effort in the Petitioner's brief to change the grounds of decision of the Board (see, for example, pp. 31, 12-13) should not affect the review of this case.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should not reverse its rule in *Swinerton* and that the portions of the Order of the National Labor Relations Board which have been excepted to by Respondents should be denied enforcement.

Respectfully submitted,

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. Secs. 151 et seq.), are as follows:

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any dis-

crimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

Union Unfair Labor Practices

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * * * * * * * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * * * * *

Prevention of Unfair Labor Practices

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsisent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C.*)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon

such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and

to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

The relevant provisions of the Administrative Procedure Act (5 U.S.C. Secs. 1001 et. seq.) are as follows:

Public Information

SEC. 3. [5 U. S. C. § 1002]. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the FEDERAL REGISTER (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon

named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) *Opinions and orders.*—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) *Public records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Rule Making

SEC. 4. [5 U. S. C. § 1003]. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the FEDERAL REGISTER (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a decription of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an

opportunity to participate in the rule making through submission of written data, views, or arguments with or without apportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Judicial Review

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(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to

the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.